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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 JANA OVERBO and NICOLE BROWN-
BOOKER

11 Plaintiffs,

12 vs.

13 LOEWS CALIFORNIA THEATRES, INC.
14 dba AMC LOEWS METREON 16 IMAX;
WESTFIELD CORPORATION; and DOES
15 1-10, Inclusive

16 Defendants.

CASE NO. 4:07-cv-05368 WDB

**Assigned to Hon. Judge Wayne D.
Brazil**

**DEFENDANT WESTFIELD, LLC'S
NOTICE OF MOTION FOR ORDER
DECLINING SUPPLEMENTAL
JURISDICTION**

Filed Concurrently With Defendant's
Memorandum of Points and Authorities In
Support of Motion For Order Declining
Supplemental Jurisdiction

Date: March 19, 2008
Time: 1:30 p.m.

Complaint Filed: October 19, 2007
Trial Date: TBD

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23 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

24 **PLEASE TAKE NOTICE** that on March 19, 2008 at 1:30 p.m., or as soon thereafter
25 as the matter may be heard in the above-entitled court, located at 1301 Clay Street, Suite
26 400S, in Oakland, California, Defendant Westfield, LLC (formerly Westfield Corporation,
27 Inc.), will and hereby does move the Court, pursuant to 28 U.S.C. § 1367(c), for an order
28

declining to exercise supplemental jurisdiction over the state law claims of Jana Overbo and Nicole Brown-Booker ("Plaintiffs").

This Motion is and will be based on the grounds that retaining jurisdiction over state law claims in ADA lawsuits is inappropriate because, among other reasons, Plaintiffs' claims raise novel or complex issues of state law, and these state law claims substantially predominate over the claims over which the district court has original jurisdiction. The Court may exercise its discretion to dismiss Plaintiffs' state law claims because Plaintiffs' state law claims raise novel and complex issues regarding the interpretation of California's Unruh Civil Right Act ("Unruh Act"), Disabled Persons Act ("DPA") and the respective statutory penalties that raise the potential for conflicting state versus federal standards of review.

This Motion will be based on this Notice of Motion and Memorandum of Points and Authorities, and the pleadings and papers on file herein, and such further arguments and papers as may be presented to the Court before or during the hearing.

Dated: February 12, 2008

KATTEN MUCHIN ROSENMAN LLP
Thomas J. Leanse
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/s/ Thomas J. Leanse
Attorney for Defendant
WESTFIELD, LLC

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16 Defendants.
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CASE NO. 4:07-cv-05368 WDB

**Assigned to Hon. Judge Wayne D.
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**DEFENDANT WESTFIELD, LLC'S
MEMORANDUM OF POINTS AND
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Summary of Argument

Defendants move this Court to decline exercising supplemental jurisdiction over the state law claims raised by Jana Overbo and Nicole Brown-Booker's ("Plaintiffs") complaint on record with the Court (the "Complaint"). Plaintiffs' Complaint asks this Court to adjudicate a federal claim for injunctive relief and two state law claims for which the parties are entitled to a jury, that also raise novel and complex issues regarding state law. Arguably, the evidence for federal and state claims relate to different time periods, to wit, the state law claims for damages involve pre-filing issues whereas the ADA claim for injunctive relief will focus on the conditions at the time of trial. This Court may decline to exercise supplemental jurisdiction over state law claims if any of the following apply:

- (1) The claim raises a novel or complex issue of state law: Plaintiffs' state law claims under the Unruh Civil Rights Act ("Unruh Act") and Disabled Persons Act ("DPA") raise novel and complex issues of state law regarding varying burdens of proof and appropriate damages that other courts have previously determined are complex and best left to state courts to address. Significantly, federal ADA and state statutory laws on these issues have disparate burdens of proof – unlike the federal ADA claim that permits only injunctive relief, the state claims permit disabled plaintiffs monetary recovery in addition to injunctive relief – that creates confusion as to which damages are proper where federal and state claims overlap. See, Botosan v. Fitzhugh, 13 F. Supp. 2d 1047 (S.D. Cal. 1998), and Doran v. Embassy Suites Hotel, 2002 WL 1968166 (N.D. Cal. Aug. 26 2002);
- (2) The state law claim(s) substantially predominate over the federal claims: Plaintiffs' state law claims substantially predominate over the sole federal claim under Title III of the ADA because the state law claims permit statutory

monetary damages whereas the federal ADA claim permits injunctive relief only. Further, all but Plaintiffs' ADA claim are based on state laws. Significantly, the standard for injunctive relief differs in federal and state courts; specifically, in federal court injunctive relief is proper only if plaintiff can show the alleged violations exist or there is a threat of future injury at the time of trial whereas in state court, injunctive relief is proper so long as plaintiffs can show a history of the alleged violations. See, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) and Estes v. Rowland, 14 Cal.App.4th 508 (1st Dist. 1993);

(3) The district court has dismissed all claims over which it has original jurisdiction; or

(4) If there is some other exceptional and compelling reason to decline jurisdiction. 28 U.S.C. § 1367(c): The principles of comity and the substantial interest in allowing state courts to determine the proper interpretation of state law also support this Court in refraining from exercising supplemental jurisdiction over Plaintiffs' state claims.

Given the foregoing, this Court is well within its discretion to decline exercising supplemental jurisdiction over Plaintiffs' state law claims and Defendant asks this Court to do so.

II. FACTUAL BACKGROUND

This cases arises out of Plaintiffs' allegations of accessibility barriers in violation of the ADA at the AMC Loews Metreon 16 IMAX theatre situated at 101 4th Street in San Francisco, California (the "Property"). According to the Complaint, Plaintiffs are persons with physical disabilities and require the use of wheelchairs to ambulate.¹ Plaintiffs allege that on several different occasions between January 2006 to May 2007, Plaintiffs attempted to visit the Property separately and jointly but have encountered barriers to access that

¹ Complaint, ¶ 1.

1 prevented Plaintiffs from enjoying full and equal access to the Property.² Based on these
 2 purported barriers, Plaintiffs filed their complaint on October 19, 2007. Specifically,
 3 Plaintiffs allege three causes of action:

- 4 1) Denial of full and equal access to the Property in violation of the Disabled Persons
 5 Act, Cal. Civ. Code § 54 ff, and the California Health & Safety Code §§ 19955, *et*
 6 *seq.*;
- 7 2) Violation of the Unruh Civil Rights Act, Cal. Civ. Code §§ 51 and 52; and
- 8 3) Violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

9 Plaintiffs are seeking statutory and treble damages under the first cause of action, statutory
 10 damages under the second cause of action, and injunctive relief under the ADA.

11 12 **III. PURSUANT TO THE COURT'S DISCRETIONARY AUTHORITY, THIS** 13 **COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL** 14 **JURISDICTION OVER PLAINTIFFS' PREDOMINANT STATE LAW** 15 **CLAIMS**

16 **A. Legal Standard**

17 "It is a fundamental precept that federal courts are courts of limited jurisdiction."
 18 Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). Pursuant to Fed. R.
 19 Civ. P. 12(b)(1), a party may challenge the court's subject matter jurisdiction on the basis
 20 that supplemental jurisdiction is improper according to 28 U.S.C. § 1367(c). Sparrow v.
 21 Mazda American Credit, 385 F. Supp. 2d 1063, 1066 (E.D. Cal. 2005). A challenge to
 22 jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) can be either facial, confining the inquiry to
 23 allegations in the complaint, or factual, permitting the court to look beyond the complaint.
 24 White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). For facial inquiries, the court need look
 25 no further than the allegations set forth in the complaint to determine whether to extend
 26 supplemental jurisdiction. Id. Once a party challenges subject matter jurisdiction, the non-
 27 moving party then bears the burden to establish that jurisdiction exists. Kokkonen v.
 28 Guardian Life Ins. Co., 511 U.S. 375, 378 (1994).

² Complaint, ¶¶ 11-15.

i. **Federal Courts Are Courts Of Limited Jurisdiction And May Decline Exercising Supplemental Jurisdiction If The Claim Raises A Novel Or Complex Issue Of State Law; State Law Claim(s) Substantially Predominate Over Federal Claims; The District Court Has Dismissed All Claims Over Which It Has Original Jurisdiction; or There Is Some Compelling Reason To Decline Jurisdiction**

It is well settled that district courts may decline to exercise supplemental jurisdiction over state law claims if any one of the following applies: (1) the claim raises a novel or complex issue of state law; (2) the state law claim(s) substantially predominate over the federal claims; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) if there is some other exceptional and compelling reason to decline jurisdiction. 28 U.S.C. § 1367(c); see, e.g., Sparrow, 385 F. Supp. 2d 1063 at 1070-71. Further, district courts have discretion to decline supplemental jurisdiction under § 1367(c) even when they have the power to exercise it. Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1174 (9th Cir. 2002). In deciding whether to exercise supplemental jurisdiction, the court should consider the interest of judicial economy, convenience, fairness and comity. City of Chicago v. International College of Surgeons, 522 U.S. 156, 173 (1997); Smith v. Lenches, 263 F. 3d 972, 977 (9th Cir. 2001).

In the present matter, three of the four factors set forth above apply such that this Court should exercise its discretion to decline supplemental jurisdiction. First, Plaintiffs' state law claims raise novel and complex issues of state law that other courts have noted are better left for state courts to interpret. See, e.g., Cross. v. Pacific Coast Plaza Investments, L.P., Slip Copy, 2007 WL 951772 (S.D. Cal. 2007); Molski v. Mandarin Touch Restaurant, 359 F.Supp.2d 924 (C.D. Cal. 2005); Peters v. CJK Associates, LLC, Slip Copy, 2003 WL 24205920 (E.D. Cal. 2003). Second, the state law claims predominate over the federal claims: two of Plaintiffs' three causes of action are state law claims and the damages under the state law claims substantially predominate the damages sought under the federal claims. Specifically, Plaintiffs' state law claims – alleged violation of the Unruh Act and DPA – would permit Plaintiffs to recover monetary compensation whereas the federal ADA claim

permits injunctive relief only (in addition to attorneys fees and costs). Third, compelling reasons such as the principles of comity, interest of discouraging forum shopping, and promotion of judicial economy are grounds for this Court to decline supplemental jurisdiction.

B. Argument

i. Plaintiffs' Claims Under The Unruh Act And DPA Present Novel And Complex Issues Of Law Due To The Ambiguity Of The Language Regarding The Proper Measure Of Damages And The Apparent Discrepancy Between Damages Under State Law Claims And The Federal ADA Claim Such That This Court Should Decline To Exercise Supplemental Jurisdiction

There is a long line of cases where courts have held it is proper to decline supplemental jurisdiction given the novel and complex issues raised by the Unruh Act and DPA claims. See, Molski, 359 F. Supp. 2d 924 (C.D. Cal. 2005); Brick Oven Restaurant, 406 F.Supp.2d 1120 (S.D. Cal. 2005); Morgan v. American Stores Co. LLC, Slip Copy, 2007 WL 1971945 (S.D. Cal. 2007); Cross, Slip Copy, 2007 WL 951772 (S.D. Cal. 2007); Peters v. CJK Associates, LLC, 2003 WL 24205920 (E.D. Cal. 2003) [in each case, the court declined to exercise supplemental jurisdiction over plaintiffs' state law claims identical to the state law claims presented in the instant action]. One reason the state law claims are complex is the ambiguity in the language regarding the proper measure of damages. Molski, 359 F. Supp. 2d at 936; Brick Oven, 406 F. Supp. 2d 1120 (S.D. Cal. 2005) [both courts noted that the damages provisions in the Unruh Act and DPA are ambiguous]. Specifically, the Unruh Act provides damages for "each and every offense" whereas the DPA provides damages solely for "each offense." Cal Civ. Code §§ 52(a) and § 54.3(a).

Thus, when a Plaintiff claims relief under both the Unruh Act and DPA, the court must interpret which standard of damage measurement – either damages for "each and every offense" or "each offense" – is proper. The difference in this statutory language makes it difficult to determine what measure of damages are appropriate and this is a concern that district courts have found confusing. In fact, two district courts reached the exact opposite

conclusion when reading these provisions: In Botosan v. Fitzhugh, 13 F. Supp. 2d 1047 (S.D. Cal. 1998) the court found that recovery of daily damages was proper; reading the exact same provisions, the Northern District court disagreed with the Botosan court and held that daily damages were not authorized by statute in Doran v. Embassy Suites Hotel, 2002 WL 1968166 (N.D. Cal. Aug. 26 2002).³

a. Plaintiffs' Burden Of Proof Required Under Federal Law Claims And State Law Claims Differ And This Difference Has Created A Discrepancy In Federal And State Courts' Interpretation Of These Claims Which Underscores That These Issues Raise Novel And Complex Questions Regarding State Law

Even before the court can arrive at the specific damage provisions to determine a proper award, there is yet another hurdle of legal complexity that further compels this Court to decline supplemental jurisdiction: The burden of proof a plaintiff bears under the federal versus state claims are significantly different and this difference creates greater confusion as to whether particular damages are proper for overlapping state and federal claims. Pursuant to the Ninth Circuit's interpretation of the ADA, plaintiffs do not need to establish discriminatory intent to prevail on a Title III claim. 42 U.S.C. § 12182(b)(2)(A)(iv); see Lentini v. California Center for the Art, 370 F.3d 837, 846-47 (9th Cir. 2004) [the court noted, "no showing of intentional discrimination is required where the Unruh Act violation is premised on an ADA violation"]. Moreover, Title III plaintiffs may seek only injunctive relief. In contrast, the Unruh Act specifically requires a showing of discriminatory intent, and Unruh Act plaintiffs that are able to show a discriminatory intent are able to recover statutorily determined monetary damages. Cal. Civ. Code § 51; see Harris v. Capital Growth Investors XIV, 52 Cal.3d 1142, 1175 (1991) [court held that "a plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act"].

³ The court apparently must also choose which cause of action plaintiffs can recover under since recovery under the DPA and the Unruh Act are mutually exclusive. As stated in Cal. Civ. Code § 54.3(c), "A person may not be held liable for damages pursuant to both this section and Section 52 for the same act or failure to act."

These differing standards create a problem because under Cal. Civ. Code § 51(f), a violation of the ADA also qualifies as a violation of the Unruh Act: Cal. Civ. Code § 51(f) states, “[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.” Thus, a plaintiff could assert a claim under the Unruh Act and effectively bypass the requirement to show intentional discrimination by making a prima facie showing of an ADA violation that does not require intentional discrimination. By doing so, plaintiffs can then seek monetary damages under the state law though the same plaintiff would be limited to only injunctive relief under the federal law. Therein lies the problem.

b. Federal And State Courts Have Been Unable To Agree On The Proper Interpretation Of Plaintiffs’ State Law Claims; This Disjunction Illustrates That These Issues Are Novel And Complex And Therefore Best Left To A State Court’s Review

Courts are no less troubled by this confusing overlap. In Lentini, the Ninth Circuit held that “no intentional discrimination is required where the Unruh Act violation is premised on an ADA violation[,]” disregarding the fact that the Unruh Act requires that plaintiffs meet the evidentiary burden of establishing discriminatory intent. Thus, whereas the Unruh Act normally requires a showing of discriminatory intent for a plaintiff to obtain monetary damages, under Lentini, so long as the ADA violation serves as the basis for the Unruh Act claim, plaintiffs can ostensibly evade the intent requirement. In Gunther v. Lin, 144 Cal.App.4th 223, 256 (Cal. App. 2006), the California appeals court disapproved of this discrepancy and stated, “[W]e cannot consider ... Lentini to be [an] accurate statement[] of our own state law and we respectfully decline to follow [it].”

Gunther thus threw yet another wrench in this confusing morass because it underscores the fact that plaintiffs in federal rather than state courts may ostensibly have an easier battle to fight, but the court of appeal’s decision does not carry the authority to require federal courts to reconsider how to evaluate ADA versus state law claims. Thus, under the current dichotomy district courts must follow the Ninth Circuit’s decision in Lentini wherein

plaintiffs could recover monetary damages even absent a showing of intentional discrimination whereas state courts must follow state precedent which affirmatively requires a showing of intentional discrimination. Put simply, the case law on this issue is complicated, inconsistent, and represents an issue that should be addressed and resolved by state courts.

Following Gunther, another district court rejected the state court's holding. Wilson v. Haria and Gogri Corp., 479 F.Supp.2d 1127, 1137 (E.D. Cal. 2007). However, in its disapproval of the court's final disposition in Gunther, the Wilson court nonetheless conceded that the "state of the law is less than clear" regarding the proper interpretation of the Unruh Act and the DPA. Thus, the holding in Wilson provides no additional insight into the proper interpretation and application of these statutes. In fact, if anything, the court's holding underscores the confusion because, "regardless of whether [Gunther] was correctly or incorrectly decided ... it 'show[s] that federal and state interpretation of the Unruh Act have diverged to such a degree that declining supplemental jurisdiction is appropriate[.]'" Morgan, Slip Copy 2007 WL 1971945 at *3 quoting Cross, 2007 WL 951772.

Other courts agree that the disparate holdings in Gunther and Wilson highlight rather than resolve the problem:

"As the circumstances presently exist, this court is faced with irreconcilable authorities based on the current status of state law. On the one hand, the court is bound by Lentini[.] [...] On the other hand, according to Gunther, Lentini is an incorrect interpretation of the Unruh Act in this regard. [...] This court cannot adhere to the teachings of both Lentini and Gunther. [...] [C]omity interests have become more, not less, compelling over time as the courts struggle to resolve what is at the moment an irreconcilable tension between the ADA and the Unruh Act. In sum Lentini and Gunther show that federal and state interpretation of the Unruh Act have diverged to such a degree that declining supplemental jurisdiction is appropriate[.]" Cross, 2007 WL 951772 at *5.

Yet another court noted the potential inequity created by this discrepancy between state and federal holdings:

“It is for the state courts, not federal courts, to determine the proper interpretation of the Unruh Act and its effects on plaintiff’s state law claims. If this Court maintains jurisdiction over Plaintiff’s state law claims, the Court will be bound by *Lentini*[.] However, if Plaintiff had filed this case in [the state court], that court would be bound by *Gunther* to deny relief unless Plaintiff showed intent.” *Oliver v. GMRI, Inc.*, Slip Copy, 2007 WL 4144995 at *3 (S.D. Cal. 2007).

Given the current “irreconcilable tension” between state and federal courts’ interpretation of this, it is well within this Court’s discretion to deny supplemental jurisdiction as the questions presented raise complex issues of state law best left to state courts to resolve. As such, declination of supplemental jurisdiction would be proper.

ii. Because Plaintiffs’ State Claims Predominate Over Its Federal Claims In Terms of Damages Sought, This Court Should Exercise Its Discretion To Decline Supplemental Jurisdiction

This court may also properly decline supplemental jurisdiction over Plaintiffs’ state law claims because the state law claims, in particular the damages sought, predominate over Plaintiffs’ federal claims. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the Supreme Court noted that state issues may substantially predominate “in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought[.]” Though *Gibbs* predates 28 U.S.C. § 1367(c), the Ninth Circuit has held that the § 1367(c) inquiry should be informed by *Gibbs*. See, *Acri v. Varian Assocs., Inc.*, 114 F. 3d 999, 1001 (9th Cir. 1997). Using the criteria set forth in *Gibbs*, it is clear that Plaintiffs’ state law claims substantially predominate over the federal claims.

a. The State and Federal Requirements For Injunctive Relief Differ Such That Plaintiffs’ Evidentiary Burdens Of Proof Would Differ For The State and Federal Claims

Two out of the three causes of action plead by Plaintiffs are state law claims. As an initial matter, the requirements for Plaintiffs’ request for injunctive relief differ under the federal and state standards. Under federal laws, Plaintiffs have standing to bring claims for injunctive relief only where there is a threat of future injury or harm. *City of Los Angeles v.*

1 Lyons, 461 U.S. 95, 111 (1983) [“an injunction ... is unavailable absent a showing of
 2 irreparable injury, a requirement that cannot be met where there is no showing of any real or
 3 immediate threat that the plaintiff will be wronged again –a “likelihood of substantial and
 4 immediate irreparable injury.”]. The issue of whether there is a threat of future harm
 5 depends on the circumstances at the time of trial. A plaintiff that cannot establish the
 6 likelihood of future injury does not have standing to sue for injunctive relief. Id.

7 In Lyons, the plaintiff sought an injunction to prevent Los Angeles police officers
 8 from using control choke holds, except in situations in which an individual appeared to
 9 threaten to use immediate deadly force. Id. at 98. The Supreme Court held that the plaintiff
 10 lacked standing to sue for injunctive relief because he was could not demonstrate that he was
 11 “likely to suffer future injury from the use of choke holds by police officers.” Id. at 105. The
 12 Court explained that in seeking injunctive relief, the mere fact that one has been injured in
 13 the past is insufficient to satisfy the standing requirement.⁴ In Lyons, the Supreme Court
 14 focused on the redressability element of standing, which requires the proposed injunctive
 15 relief to be likely to redress the plaintiff's injury. “[Lyons] is based on the obvious
 16 proposition that a prospective remedy will provide no relief for an injury that is, and likely
 17 will remain, entirely in the past.” Id. Indeed, every court to consider the ADA's standing
 18 requirements has held that a private litigant must prove standing by showing a risk of *future*
 19 harm.⁵ Thus, under the federal claim, Plaintiffs' evidentiary burden would be show that non-

22 ⁴ Id. at 95-96. See also O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974) (“past exposure to illegal
 23 conduct does not in itself show a present case or controversy regarding injunctive relief... if
 24 unaccompanied by any continuing, present adverse effects”); Friends of the Earth, Inc. v. Laidlaw
 25 Envntl. Servs. (TOC), Inc., 528 U.S. 167 (2000) (citing Lyons approvingly); Am. Postal Workers
 26 Union v. Frank, 968 F.2d 1373 (1st Cir. 1992) (“[Lyons] reaffirmed the principle that past exposure
 27 to harm will not, in an of itself, confer standing upon a litigant to obtain equitable relief absent a
 28 sufficient likelihood that he will again be wronged in a similar.” [internal quotation marks omitted]).
⁵ See, e.g., Shotz v. Cates, 256 F.3d 1077 (11th Cir 2001) (ruling that plaintiffs lacked standing where
 they had only visited non-compliant courthouse once in two-year span); Plumley v. Landmark
Chevrolet, Inc., 122 F.3d 308, 312 (5th Cir. 1997) (holding that ADA claim under Title III did not
 survive plaintiff's death); Aikins v. St. Helena Hosp., 843 F.Supp. 1329, 1333-34 (N.D. Cal. 1994)
 (no standing because no showing that plaintiff would use hospital again or that it would discriminate
 against plaintiff again).

1 compliant conditions exist *at the time of trial* in order to show a need for prospective relief in
2 the form of an injunction.

3 On the other hand, a litigant seeking relief under the state laws need only show a
4 history of past harm that *may* reoccur: As the court noted in Estes v. Rowland, 14
5 Cal.App.4th 508, 525 (1st Dist. 1993), “injunctive relief ... may be granted where past
6 practices have been stopped in anticipation of suit, and may be resumed if there is no
7 injunction to prevent it.” Moreover, the language of the Unruh Act and DPA permit the
8 award of statutory monetary damages for pre-filing violations. Cal. Civ. Code §§ 52, 54.3.
9 Thus, under the state disability claims, Plaintiffs may allege facts relating to conditions at the
10 Property *prior* to commencing litigation in order to seek the statutory damages whereas the
11 inquiry for the federal ADA claim for injunctive relief addresses only whether there is a
12 threat of future harm. Thus, under the state claims, Plaintiffs’ could potentially prevail
13 simply by showing that conditions at the Property were non-compliant at any time prior to
14 filing this action.

15 Plaintiffs’ evidentiary burden therefore differs for the state and federal claims. The
16 result works an inequity in Plaintiffs’ favor because (1) they would be permitted to bring
17 state disability claims that provide for monetary damages and effectively bypass the
18 requirements to show intentional discrimination (pursuant to state court interpretation of the
19 state disability laws) and then (2) can further bypass the requirement to show a threat of
20 future harm because the potentially available relief for the state disability claims focuses on
21 pre-filing issues rather than conditions at the time of trial. Thus, the standards for relief are
22 inconsistent under federal and state standards. Procedural considerations support this Court
23 in declining to exercise supplemental jurisdiction over Plaintiffs’ state law claims.

24 Furthermore, the statutory damages potentially available to the Plaintiffs under the
25 state law claims substantially predominate over the relief available under the ADA. Under
26 the per violation standard of the Unruh Act or the DPA, Plaintiffs could potentially recover a
27 minimum of \$4,000 per violation (though again, it is unclear whether that means \$4,000 per
28

day or \$4,000 per ADA violation, or some other measurement). In contrast, Plaintiffs would only be entitled to injunctive relief and attorneys' fees under the ADA. Given the disproportionate results, it is clear that the remedies under the state claims substantially predominate such that this Court should exercise its discretion to decline supplemental jurisdiction.

b. Pursuant to Gibbs, Plaintiffs' State And Federal Claims Are Different In Terms Of Required Proof And Availability Of Jury Trial

Another procedural difference between Plaintiffs' state and federal claims is that Plaintiffs seek a jury trial for their state claims whereas no jury trial is available for the federal ADA claim. See, Hobleman v. Kentucky Fried Chicken, KFC USA, Inc., 260 F.Supp.2d 801, 805 (D.Neb. 2003) ("Title III of the ADA does not provide for monetary damages or, concomitantly, a jury trial, when the action is brought by a 'person who is being subjected to discrimination.'" Citing 42 U.S.C. § 12188(a)(2)). Traditionally, the right to a jury trial for a civil action is limited to actions "at law" and not for proceedings "in equity." See, C&K Engineering Contractors v. Amber Steel Co., Inc. 23 Cal.3d 1, 8 (1978). Actions "at law" include claims for monetary damages; therefore, Plaintiffs' state disability claims seeking statutory damages qualifies as an action "at law" for which Plaintiffs seek a jury trial. In contrast, Plaintiffs' federal ADA claim is limited to injunctive relief only and therefore falls under the category of a proceeding "in equity" for which a jury trial is unavailable. Case law also supports this position that an action under Title III of the ADA does not permit a jury trial. See, Hobleman, supra, and Gonzales v. National Board of Medical Examiners, 225 F.3d 620, 635 (6 Cir. 2000) (Gilman, J., dissenting) (stating that it "appears doubtful" that Title III plaintiffs are entitled to jury trial as Title III permits only injunctive relief).

If this Court were to adjudicate just the ADA claim, this matter would consist of a simple bench trial that would look at whether accessibility issues existed at the time of trial such as to warrant the request for injunctive relief. This would be a fairly simple,

1 uncomplicated inquiry. On the other hand, a jury trial for Plaintiffs' state claims would be
 2 more complicated, timely, and costly for Defendants and this Court. This procedural
 3 consideration also supports this Court from exercising supplemental jurisdiction over
 4 Plaintiffs' state claims.

5 Other courts have concluded that in cases involving the same issues before this Court,
 6 the state law claims "substantially predominate" over the remedy sought under the federal
 7 claims. See, Molski, 359 F. Supp. 2d at 937; Brick Oven, 406 F. Supp. 2d at 1131 (citing
 8 Gibbs at 726 quoted above). Given the substantial disparity in the procedural considerations
 9 and remedies available to Plaintiffs, it is well within this court's discretion to refrain from
 10 exercising supplemental jurisdiction over Plaintiffs' state law claims.

11 **iii. The Principle of Comity and Other Compelling Reasons Make It** 12 **Reasonable For This Court To Decline Supplemental Jurisdiction**

13 The principle of comity also supports this court from exercising supplemental
 14 jurisdiction over Plaintiffs' state law claims. There is a strong interest in allowing state
 15 courts to assess and determine the proper interpretation of the complex state laws at issue.
 16 This is particularly true given the disjunction between federal and state court interpretation
 17 of the damages provisions of the state laws, so it is imperative that district courts allow state
 18 courts to determine how best to interpret the language of the state laws. As the court in
 19 Gibbs observed, "needless decisions of state law should be avoided both as a matter of
 20 comity and to promote justice between the parties, by procuring for them a surer-footed
 21 reading of applicable law." Gibbs, 383 U.S. at 726. Therefore, California courts should be
 22 given the opportunity to interpret the language in the state statutory law in order to ensure
 23 that the parties in the present matter are provided "surer-footed" interpretation of California
 24 disability laws.

25 Another compelling reason for this court to decline exercising supplemental
 26 jurisdiction is the interest of judicial economy. Whereas the Plaintiffs may contend that it
 27 would be judicially uneconomical to require filing a new state claim, this would be the most
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efficient use of the courts because it would allow the district court to determine the ADA issue without having to address the complicated and ambiguous state law issues. Requiring Plaintiffs to separately file their state claims does not negatively impact Plaintiffs because this case is only in its pre-discovery stage so filing a separate state claim would not work an injustice against Plaintiffs. Indeed, Plaintiffs would be free to pursue her claims, including all monetary and injunctive relief, in state court. Moreover, because Plaintiffs' evidence for the ADA claims and state law claims require different evidence, requiring Plaintiffs to file a separate state claim would not severely inconvenience or impact Plaintiffs ability to try their case. Most importantly, however, the California courts are the proper forum to determine the proper interpretation of the Unruh Act and DPA.

IV. CONCLUSION

Substantial and compelling reasons support this Court to decline exercising supplemental jurisdiction over Plaintiffs' state law claims given the disparity of evidentiary and procedural considerations between the state and federal claims in addition to the fact that Plaintiffs' state claims present novel and complex issues best left for a state court to decide:

State Claims	Federal Claim
Injunctive relief permitted even if there is no immediate threat of future harm or injury so long as Plaintiffs can show past harm that may reoccur. This requires evidence that barriers to access existed prior to the commencement of this action.	Injunctive relief proper only if there is a real threat of future harm – no injunctive relief for injury in the past. This requires evidence that barriers to access existed at the time of trial only.
Jury trial permitted.	No jury trial available.
Unruh Act and DPA claims raise novel and complex issues best left for state courts to adjudicate.	ADA claim raises a simple issue that looks only at whether the barriers to access exist at the time of trial.
State claims require evidence of pre-filing violations and adjudication of the matter would take greater time in	Federal claim would not require extensive discovery and would not over-tax this Court's resources given

light of the litigation procedure (e.g., depositions, discovery) which would tie up this Court's resources unnecessarily to decide matters predominantly involving state issues.	the limited inquiry.
The Unruh Act and DPA require a showing of intentional discrimination.	The ADA does not require Plaintiffs to address the issue of intent; thus, by allowing Plaintiffs' state claims to be adjudicated by a federal court, Plaintiffs could effectively and unfairly avoid the additional requirement to show intent per the disparate holdings in <i>Lentini</i> and <i>Gunther</i> , supra.

In addition to the foregoing, Plaintiffs would suffer no prejudice if required to re-file the state actions in state court because this case is only in the pre-discovery phase. Accordingly, this court should decline to exercise jurisdiction over Plaintiffs' state law claims.

Respectfully submitted,

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